(CP:cls 8-28-78)

Supreme Court, U. S.
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NO. 78-5373

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

WEEGAIL WASHINGTON, APPELLANT

V.

STATE OF TEXAS, APPELLEE

APPEAL FROM THE TRAVIS COUNTY COURT AT LAW, NUMBER ONE
TRAVIS COUNTY, TEXAS

JURISDICTIONAL STATEMENT

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NO. _____

IN THE

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WEEGAIL WASHINGTON, APPELLANT

V.

STATE OF TEXAS, APPELLEE

APPEAL FROM THE TRAVIS COUNTY COURT AT LAW, NUMBER ONE
TRAVIS COUNTY, TEXAS

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the County Court at Law, Number One, Travis County, Texas, entered June 16, 1978, finding Appellant guilty of the crime of Failure to Identify.

Appellant would apprise the Court that this Jurisdictional Statement raises issues identical to those now before the Court on appeal, in Cause No. 77-6673, Zachary C. Brown v. The State of Texas

OPINIONS BELOW

No opinion was rendered by the Court from which this appeal is taken.

JURISDICTION

This action is brought by the Appellant to challenge the Constitutionality of Section 38.02 of the Texas Penal Code, and to reverse the judgment of her conviction based upon this statute. Judgment of Appellant's conviction in the County Court at Law, Number One, Travis County, Texas, was entered on June 16, 1978, and punishment was set at a fine of ninety-five dollars. Thereafter, Notice of Appeal to the United States Supreme Court was filed in the Travis County Court at Law, Number One, on August 14, 1978.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257(2).[1]

The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on appeal in this case. Cohen v. California, 403 U.S. 15 (1971); Dahnke-Walker Milling Co. v. Bondirant, 257 U.S. 282 (1921).

In this appeal, Appellant challenges the Constitutionality of Section 38.02 of the Texas Penal Code, which provides as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

The validity of Section 38.02 was sustained by the Travis County Court at Law, Number One, over Appellant's Motion to Dismiss setting forth the particular Constitutional rights of which this statute had deprived her.

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[1] Pursuant to the Texas Code of Criminal Procedure, Art. 4.03, no appeal may be had from a County Court at Law where punishment is set only at a fine, and the fine imposed does not exceed $100.00. Article 4.03, T.C.C.P., provides as follows:

> "The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court, or county court at law shall not exceed one hundred dollars."

The Texas Court of Criminal Appeals has upheld this statute in Coates v. State, 308 S.W.2d 869 (Tex.Crim.App. 1957).

QUESTIONS PRESENTED

I. Whether Section 38.02 of the Texas Penal Code has infringed upon Appellant's Constitutional right to free speech, as guaranteed by the First Amendment, by the use of statutory language which is Constitutionally invalid for vagueness and overbreadth.

II. Whether Section 38.02 of the Texas Penal Code has violated Constitutional rights guaranteed by the Fifth and Fourteenth Amendments, by imposing criminal penalties upon the exercise of Appellant's privilege against self-incrimination.

STATEMENT OF THE CASE

On the evening of June 30, 1977, at approximately 10:15 p.m., as two officers of the Austin Police Department were drving through the downtown area of Austin, Texas, they observed the Appellant walking along the street, across from the Greyhound Bus Terminal.

At trial, the officers testified that they thought Appellant might have been a prostitute, that they did not know her name, and that they were supposed to learn the names of all such persons. As Appellant walked along the street, the officers drove up beside her and after making verbal contact, one officer asked Appellant her name. At this time, Appellant declined to give the officer her name and continued to walk along the street. The officers stated that Appellant was again asked her name, and that when she did not answer, she was arrested, taken to jail and charged with having violated Section 38.02 of the Texas Penal Code.

During trial it was admitted that neither police officer had observed the Appellant committing a crime, and that neither officer had probable cause to believe that a crime had been or was being committed at the time Appellant was approached.

When her turn came, Appellant testified that she was employed by the United States Marshall's Office in Fort Worth, Texas, as a matron guard who assisted in the transporation of female prisoners; that she had driven to Austin to visit a friend over the weekend; and that at the time she was stopped, she informed the police officers that she was on her way to a club in the downtown area.

Prior to trial, Appellant presented to the Court both a written and oral Motion to Dismiss the charge against Appellant on the ground that Section 38.02 deprived her of rights guaranteed by the First, Fourth, Fifth, Sixth, Nineth, and Fourteenth Amendments to the Constitution of the United States. Appellant's Motion to Dismiss was denied by the Court. Subsequently, Appellant was convicted for having violated Section 38.02 of the Texas Penal Code, and now brings this Appeal to protect her Constitutional rights.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellant presents this Court with two questions for determination. Both questions are manifestly substantial and in urgent need of resolution by the Court.

First at issue is whether the Appellant was deprived of Constitutional rights guaranteed by the First Amendment when she was convicted under Section 38.02 of the Texas Penal Code, for chosing to remain silent in response to questions by the police.

Appellant would advise the Court that this case does not concern the regulation of symbolic speech, speech mixed with elements of non-speech, or conduct in speech clothing. United States v. O'Brien, 391 U.S. 307 (1968); Tinker v. Des Moines Ind. Sch. Dist., 393 U.S. 503(1969); Brown v. Louisiana, 383 U.S. 131 (1966). This controversy does not involve the regulation of language exiled beyond the frontiers of the First Amendment's protection. Roth v. United States, 354 U.S. 476 (1957). Nor does it concern the regulation of "fighting words" or words intended to provoke hostility and violence from a given audience. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminello v. Chicago, 337 U.S. 1 (1949).

Rather, Appellant would show the Court that this Case represents the State's attempt to regulate the purest and most fundamental form of speech: silence.

In resolving such questions, this Court has often and unequivocally established a preferred position for freedom of expression when such First Amendment rights are placed in jeopardy by criminal statutes. Smith v. California, 361 U.S. 147 (1959); Ashton v. Kentucky, 384 U.S. 195 (1966). Further, it must be noted that the Supreme Court has long held that statutes which penalize the form and content of speech must be carefully drawn to punish only unprotected speech and not be susceptible of application to protected expression. Cantwell v. Connecticut, 301 U.S. 296 (1940); Gooding v. Wilson, 405 U.S. 518 (1972). When such principles are applied to the statute in question, Section 38.02 of the Texas Penal Code, it is clear that Appellant was convicted under a law that is Constitutionally invalid for vagueness and overbreadth.

The regulation involved in Section 38.02, even though it lacks neither clarity nor precision, may not achieve its ends by means which sweep so broadly that the statute deters the exercise of free expression. Zwickler v. Koota, 389 U.S. 241 (1967). Moreover, Appellant submits that Section 38.02, by its plain terms, is not easily susceptible of a narrowing construction. Dombrowski v. Pfister, 380 U.S. 479 (1965); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

Appellant would advise the Court that the deterrent effect of this statute is both real and substantial. The existance of Section 38.02 has allowed the State of Texas to convict the Appellant for remaining silent, not only when she had committed no crime or breach of the peace, but also where the State was without even probable cause to believe that a crime or breach had been or was being committed.

Thus, the vagueness and overbreadth of Section 38.02 of the Texas Penal Code have deprived the Appellant of Constitutional rights guaranteed by the First Amendment, and have unconstitutionally

infringed upon her right of free expression by punishing the form and content of her speech where no substantial interest exists for such regulation. Cohen v. California, 403 U.S. 15 (1971).

This appeal presents a second vital question for resolution by the Court. May a State compel a person to waive the privilege against self-incrimination by threating to impose criminal penalties if such waiver is not given?

The Constitutional protection against self-incrimination guaranteed by the Fifth Amendment, provides that "No person...shall be compelled in any criminal cause to be a witness against himself." Since the Supreme Court's decision in Malloy v. Hogan, 378 U.S. 1 (1964), this right afforded by the Fifth Amendment has been protected against abridgment by the States. Moreover, the Supreme Court has continually established precedents protecting citizens from infringement upon their Fifth Amendment rights.

In Malloy, 378 U.S. at 8, the Supreme Court declared that the "privilege [against self-incrimination] is fulfilled only when a person is guaranteed the right to remain silent in the unfettered exercise of his own free will."(Emphasis added). Continuing, the Court stated, "The privilege afforded not only extends to answers that would in themselves support a conviction, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." 378 U.S. at 11.

A year later, in Miranda v. Arizona, 384 U.S. (1966), in a lengthy and detailed opinion, the Court firmly resolved,

> Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. 384 U.S. at 467.

Further evidence of the great weight to be accorded the right to remain silent has been demonstrated by the Supreme Court's decisions in Lefkowitz v. Turley, 414 U.S. 70 (1973); United States v. Hale, 422 U.S. 171 (1975); and Doyle v. Ohio, 426 U.S. 610 (1976).

Finally, the Court has emphasized most recently that one protected by the privilege against self-incrimination

> ...may rightly refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. (Citations omitted). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible in later proceeding. Garner v. United States, 424 U.S. 648, 653 (1976).

Against this back-drop of historical precedent are posed the circumstances in Appellant's case. The choice imposed on Appellant was one between sacrificing her Fifth Amendment rights or risking conviction under Section 38.02 of the Texas Penal Code. Faced with this dilemma, the Appellant remained silent and was convicted. Such circumstances, Appellant submits, are totally incompatible with the precedents established by the Court, as set forth herein. Further, this Court has clearly announced it will not permit a penalty to be imposed upon one who seeks to exercise the Constitutional privilege against self-incrimination. Griffin v. California, 380 U.S. 609 (1965); Miranda, 384 U.S. at 468.

As a result, Appellant urges the Court to uphold the heritage and tradition of its role as guardian of the privilege against self-incrimination and to protect Appellant against the penalty which has been imposed upon the free exercise of her Fifth Amendment rights.

CONCLUSION

In conclusion, Appellant would show that the questions presented above are of substantial effect and importance. Under Section 38.02 of the Texas Penal Code, every citizen in the State of Texas is at the present time penalized in the unfettered exercise of their freedom of speech and privilege against self-incrimination. Threatened with the loss of these rights guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution, Appellant would urge the Court to note probable jurisdiction and set this case for argument on the merits.

Respectfully submitted,

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By: Don Gladden
DON GLADDEN

By: Charles Padorr
CHARLES PADORR

ATTORNEYS FOR APPELLANT

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Statement was delivered to Appellee by mailing a copy of same to The Hon. John L. Hill, Jr., Attorney General for the State of Texas, at the Supreme Court Bldg., Austin, Texas, on this 6th day of September, 1978.

Don Gladden
DON GLADDEN

APPENDIX A

NO. 168-340

THE STATE OF TEXAS
Vs.
Negail Washington

IN THE COUNTY COURT AT LAW
NO. 1,
TRAVIS COUNTY, TEXAS.

On this the 16 day of June, A.D. 1978, this cause being called for trial, came the State of Texas, by her County Attorney, and came the Defendant in person and by his Attorney, and the Defendant being duly arraigned, pleaded "Not Guilty" to the charge contained in the Information, to wit: Failure to Identify and demanded a trial by Jury.

Both parties announcing ready for trial, a Jury of six good and lawful persons, to wit: Edward V. Chambers and five others, were duly selected, impanelled and sworn, according to law, who having heard the Information read and the Defendant's plea of "Not Guilty" thereto, and having heard the evidence submitted, and having been duly charged by the Court, and having heard the argument of counsel, retired to consider their verdict, and afterward returned into open court the following verdict, which was received by the Court and is herenow entered upon the Minutes of the Court, to wit:

"We, the Jury, find the Defendant, Negail Washington, Guilty."

Edward V. Chambers
FOREMAN OF THE JURY",

And on said date the Defendant, Negail Washington, having filed a motion for the Court to assess punishment in event of conviction, being present in person before the Court for the purpose of having punishment assessed, It is the Order of the Court that the said Defendant is Guilty as found by the Jury and his punishment is assessed at a fine of $ 95.00 and ~~confinement in the County Jail,~~ and all costs in this behalf incurred.

And on said date the Defendant Negail Washington having filed a waiver of delay in sentencing Defendant, being present in person before the Court for the purpose of having sentence pronounced against him in accordance with the judgment of the Court heretofore entered in said cause, being questioned, geve no reason why sentence should not be pronounced, but petitioning the Court to delay implementation of the hereinafter pronounced sentence of the Court until July 26, 1978 for good and sufficient reason to the Court, whereupon the Court proceeded to pronounce sentence in the presence of said Defendant as follows:

It is the Order of the Court that the said Defendant Negail Washington who has been adjudged Guilty of the offense of Failure to Identify be and he is hereby sentenced ~~to be imprisoned in the County Jail of Travis County, Texas, for days~~; and that the State of Texas do have and recover of the Defendant the said fine of Ninety-five DOLLARS, and all costs of this prosecution; commitment is ordered issued on or before July 26, 1978, and at time of issuance of the commitment, Defendant is remanded to the custody of the Sheriff of Travis County, Texas, who will commit him forthwith to the Jail of said County until said period of imprisonment has expired and thereafter until said fine and costs are fully paid or otherwise discharged.

It is further ordered that execution may issue against the property of said Defendant for the amount of said fine and costs.

FILED AT 12:26 P.M.
June 16, 1978

Brock Jones
JUDGE PRESIDING

APPENDIX B

CAUSE NO. 168-340

STATE OF TEXAS	X	IN THE COUNTY COURT AT LAW
V.	X	NUMBER ONE
WEEGAIL WASHINGTON	X	TRAVIS COUNTY, TEXAS

NOTICE OF APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Weegail Washington, Defendant in the above referenced cause and hereby gives Notice of Appeal to the Supreme Court of the United States from the judgment of conviction entered against the Defendant by this Court on June 16, 1978.

This appeal is taken pursuant to 28 U.S.C.§1257(2).

Respectfully submitted,

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FILED
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